
UTAH LABOR COMMISSION

BRYAN BERGLUND,

Petitioner,

vs.

**NAPA AUTO PARTS, PHOENIX
INSURANCE CO., and ST. PAUL
TRAVELERS,**

Respondents.

**ORDER SETTING ASIDE
ALJ'S DECISION**

ORDER OF REMAND

Case No. 06-0007

Napa Auto Parts and its insurance carriers, Phoenix Insurance Co. and St. Paul Travelers, (referred to jointly as "Napa") ask the Utah Labor Commission to review Administrative Law Judge Marlowe's award of benefits to Bryan Berglund under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63G-4-301 and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Mr. Berglund claims workers' compensation benefits for back injuries allegedly caused by a work accident at Napa on November 30, 2005. An evidentiary hearing was scheduled on the claim for June 28, 2006. Seven business days before the hearing, Napa submitted the report of Dr. Knoebel, Napa's medical consultant, to Mr. Berglund. In summary, Dr. Knoebel's report concluded that Mr. Berglund's work accident did not cause his back injury.

When Napa offered Dr. Knoebel's report as evidence at the hearing, Mr. Berglund objected to the report's admission on the grounds that, pursuant to Commission rules, Dr. Knoebel's report 1) should have been submitted with Napa's answer and 2) should have been provided at least 10 business days prior to hearing. Judge Marlowe granted Mr. Berglund's request to exclude Dr. Knoebel's report from evidence. Judge Marlowe then proceeded with the hearing and subsequently issued a decision awarding benefits to Mr. Berglund. In that decision, Judge Marlowe explained her exclusion of Dr. Knoebel's report as follows:

. . . the report [was] excluded on the basis that [Mr. Berglund] would be significantly prejudiced by the report, especially in light of the rule requiring [Napa] to submit a medical opinion with its answer if it intends to defend on the basis of lack of medical causation.

In its motion for review to the Commission, Napa argues that Judge Marlowe misinterpreted

Commission rules regarding the submission of medical evidence. Napa also argues that its late submission of Dr. Knoebel's report was justified under the circumstances of this case and that the late report did not unfairly prejudice Mr. Berglund.

DISCUSSION AND CONCLUSION OF LAW

It appears Judge Marlowe relied on Commission Rule R612-2-1.C.4 as the basis for excluding Dr. Knoebel's report from evidence. Rule R612-2-1.C.4 provides: "When liability is denied based upon medical issues, copies of all available medical reports sufficient to support the denial of liability shall be filed with the answer." As Napa points out, Dr. Knoebel's report had not yet been written at the time Napa filed its answer to Mr. Berglund's claim. Consequently, the report was not "available" and could not have been filed with Napa's answer. The Commission therefore concludes that Rule R612-2-1.C.4. does not support Judge Marlowe's exclusion of Dr. Knoebel's report.

However, Mr. Berglund also sought exclusion of Dr. Knoebel's report on the grounds that Napa's production of the report only seven days prior to hearing violated another Commission rule-- Rule R612-2-1.H.5, which provides as follows (emphasis added):

The medical record exhibit prepared by the respondent shall be delivered to the Division and the petitioner or petitioner's counsel at least ten (10) working days prior to the hearing. **Late-filed medical records may or may not be admitted at the discretion of the administrative law judge by stipulation or for good cause shown.**

In other cases, the Commission has excluded medical evidence not submitted within the time limit established by Rule R612-2-1.H.5, and the Utah Court of Appeals has upheld the Commission's action if reasonable under the circumstances of the particular case. See *Stampede, Inc. v. Kimball, et al.* Utah Court of Appeals Case No. 950815-CA, issued November 15, 1996 (unpublished memorandum decision). In this case, while it is apparent that Napa did not meet Rule R612-2-1.H.5's 10-day requirement, there has been no finding that "good cause" supports either the admission or exclusion of the report. Such a finding is required by Rule R612-2-1.H.5. And based on its review of the hearing record, the Commission finds insufficient information to support a reasoned decision one way or the other. For example, the hearing record does not establish the date on which Napa actually asked Dr. Knoebel to undertake the review of Mr. Berglund's medical records. That information and perhaps other information as well, is necessary in deciding whether good cause exists to admit or exclude Dr. Knoebel's report.

Because admission or exclusion of Dr. Knoebel's report may determine whether Mr. Berglund's claim is referred to a medical panel, the Commission sets aside Judge Marlowe's prior order and remands this matter to Judge Marlowe to complete the evidentiary record. Judge Marlowe will then issue a new decision as she deems appropriate.

ORDER

The Commission remands the matter to Judge Marlowe for further proceedings and decision consistent with this decision. It is so ordered.

Dated this 2nd day of October, 2008.

Sherrie Hayashi
Utah Labor Commissioner